84-595

No. . . . . .

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ALAN R. JAMPOL and
NOLAN F. KING,

Petitioners,

vs.

SOUTHERN CALIFORNIA RETAIL CLERKS
UNION AND DRUG EMPLOYER PENSION
AND TRUST FUND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD L. LASCHER

605 Poli Street
Post Office Box AJ
Ventura, Calif. 93002
(805) 648-3228

Attorney for Petitioners

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QUESTION PRESENTED

Are lawyers handling appeals entitled to the same due process rights to notice and opportunity to be heard as trial counsel concerning fees and extra costs (28 U.S.C. §1927), imposition of monetary sanctions (Rule 38, F.R.A.P.), and public denunciation for alleged misconduct?

PARTIES

In addition to those named in the caption, George J. Malhiot and Marjorie M. Malhiot (petitioners' clients) were parties below.

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OPINION BELOW

The majority and dissenting opinions of the Court of Appeals [Appendix A] appear at 735 F.2d 1133. There was no District Court opinion.

JURISDICTION

Judgment of the Court of Appeals was entered June 19, 1984; timely petition for rehearing and request for hearing on sanctions were denied July 24, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

The Fifth Amendment provides, in pertinent part:

> "No person shall . . . be deprived of life, liberty or property, without due process of law . . .".

28 U.S.C. §1927 provides, as pertinent:

> "Any attorney . . . admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

Rule 38, F.R.A.P., provides:

"If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

STATEMENT OF THE CASE

Petitioners, each of whom is admitted to the bar of California and the courts below, represented George and Marjorie Malhiot in part of the litigation which produces this petition. Petitioner King conducted the trial but arranged for petitioner Jampol to pursue posttrial motions and appeal [Ptn.Rhrg., p. 2].

Underlying Controversy

The Malhiots sought reimbursement for medical expenditures under a plan administered by the respondent Trust for Marjorie's employer. Rebuffed on the ground they were not validly married under California law, the couple sued

in District Court. Upon adverse decision, they appealed, but the Ninth Circuit affirmed. The propriety of their claim is not involved here.[1/]

Punishment of Petitioners

Since an order previously made in another case required petitioner Jampol to be in Europe on the date set for argument of the appeal, he twice applied (with his opponent's support) for postponement.

The Court of Appeal, without hearing from petitioner King, not only refused to change the date, but ordered that no argument, by anyone, would be allowed

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1/ The Malhiots' interests are not overlooked. Petitioners continue to believe the substantive holding below to be clearly wrong under applicable state law, just as they regard the majority's ancillary and punitive rulings as untenable. They recognize, however, that this Court neither may nor should be asked to resolve every issue of pure state substantive law.

[App. B, p. A-26].

When the majority opinion was filed, it devoted a separate section (§IV) to proclaiming petitioners guilty of "knowingly [making] a false statement of fact or law", acting prejudicially to the administration of justice, and making unlawful claims, all this said to constitute (1) ethical violations, (2) bad faith, and (3) intentional misconduct. Besides public condemnation, monetary sanctions of $1500 were imposed on petitioners [A-19; 735 F.2d at 1138].

The Court of Appeals had theretofore given no indication it contemplated any such steps, nor were petitioners afforded opportunity to meet the accusations, learning of them only when the opinion issued. Their petition for rehearing on the merits and to be heard on the charges was summarily denied [App. C, p. A-27].

A dissent reasoned that petitioners were entitled to notice and opportunity to be heard under Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980) and applicable Ninth Circuit decisions. It also noted that such protections were particularly necessary here since there was no oral argument and, with two attorneys involved, "at least one [might] be able to convince us that he had no part in" any criticized conduct [A-23; 735 F.2d at 1138-1139].

REASONS FOR GRANTING THE WRIT

Under this Court's decision in Roadway, supra, 447 U.S. at 767, due process guards trial lawyers against punishment or stigmatization without notice or hearing. This petition seeks to establish the same due process rights for appellate counsel.

I.

THE PROCEEDINGS BELOW DENIED PETITIONERS DUE PROCESS.

As recognized cogently in Judge Boochever's dissent [A-20-21; 735 F.2d at 1138-1139], Roadway established that trial courts "certainly" may not assess monetary impositions against trial lawyers "lightly or without fair notice and opportunity for a hearing on the record" (447 U.S. at 766-767).

Here, petitioners were fined a substantial sum without notice or opportunity; this would seem dispositive. (See also, Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223, 226-228 (7th Cir. 1984); Matter of Hartford Textile Corp., 613 F.2d 388 (2nd

Cir. 1979), cert. den., 447 U.S. 907.)[2/]

However, the majority opinion did not stop with monetary imposition. Rather, it went beyond to convict and castigate these two lawyers for "bad faith or intentional misconduct" said to include:

-- "many misrepresentations of the record";

-- "intentional misstatement of California law" (emphasis added);

-- "conduct that involves misrepresentation or that is prejudicial to the administration of justice" in violation of the Code of Professional Responsibility; and

-- "present[ing] claims unwarranted by existing law" [A-17-19;

2/ The highest court of California examined the subject carefully and persuasively in In re Marriage of Flaherty, 31 Cal.3d 637, 651-654, 183 Cal.Rptr. 508, 517-519, 646 P.2d 179, 188-190 (1982).

735 F.2d at 1[38].

All this appears in a published opinion to be read by judges, lawyers and other citizens in perpetuity.

> "Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."
>
> Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

Adages concerning value of purses versus names come readily to mind.[3/] At stake here is a direct and authoritative attainder for lack of professional integrity and ability in the pursuit of petitioners' livelihood, exacerbated by thinly veiled urging of disciplinary action.

Noticeless and hearingless imposition of those consequences far overshadows in gravity most other governmental imposi-

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3/ Othello, Act III, Scene 3; Proverbs 22:1.

tions against which the shield of due process has been raised.

Two brief clarifications are in order. The first is that facial validity of Rule 38 and §1927 is not questioned. What must be scrutinized is the manner in which those valid laws are applied in relation to rights of particular individuals (Boddie v. Connecticut, 401 U.S. 37, 379-380 (1971); Little v. Streater, 452 U.S. 1, 16-17 (1981)).

Second, the "altered status" requirement enunciated in Paul v. Davis, 424 U.S. 693, 708-710 (1976) does not qualify the due process considerations on this record. This was not merely some putatively defamatory remark by a government official (424 U.S. at 708). Instead, the status of petitioners (one of whose involvement in the appeal was only titular) was changed by published

judicial decree from that of professionals in good standing to that of outlawry.

One must recall that, however lacking in the notice and hearing usually indispensable to adjudication it may have been, the vehicle of petitioners' attainder still has all the trappings of judicial action. It also generates all the adverse consequences of adjudication: here, a life sentence to public branding as liars, cheats and scoundrels. That is the epitome of governmentally imposed status change (see Board of Regents v. Roth, 408 U.S. 564, 571-574 (1972) and Goss v. Lopez, 419 U.S. 565, 576-576, 580-582 (1975)).

II.

THE REALISTIC IMPACT AND IMPLICATIONS OF THE PROCEEDINGS BELOW ILLUSTRATE THE NEED FOR RESOLUTION HERE.

Petitioners realize that not every due process controversy can be added to this Court's docket. However, the currently widespread judicial activity on the subject presented, particularly when viewed against the aggravated facts, renders this an apt vehicle for resolution of the issues presented.

A. PREVALENCE OF THE PROBLEM.

It is a judicially noticeable fact that both Rule 38 and §1927 have been employed sparingly until recently (see Asberry v. United States Postal Service, 692 F.2d 1378, 1382, fn. 7 and accompanying text (Fed.Cir. 1982)). It is equally clear, however, that a sudden, dramatic

transformation is underway, nowhere more graphically illustrated than in the Ninth Circuit.

In barely three months, starting with this case, that court has imposed appellate sanctions in four published opinions,[4/] a number which appears to exceed any circuit's previous yearly total. Thus, the question is one of immediate, expanding, and realistic impact.

B. DEPARTURE FROM SETTLED AUTHORITY.

More attention arresting than raw numbers (or their "sunburst" nature), is

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4/ Thompson v. Teca-Rand International, ____ F.2d _____, Nos. 82-4703 and 83-1930 (8/16/84); Scott v. Younger, ____ F.2d ____, No. 83-6090 (8/14/84); Pepperling v. Risley, 739 F.2d 443 (9th Cir. 1984); and the case at bench. It is impossible to ascertain whether there are other cases in which monetary sanctions were imposed, but by unpublished opinions, so that no public condemnation occurred.

the fact that the 1984 appellate sanction cases have stopped even mentioning notice or hearing for lawyers. There is unadorned rush to punish. This stands in sharp contrast to the Ninth Circuit's own previous care in affording parties and trial lawyers opportunity for defense before denunciation, as stressed in the dissent below [A-21-24; 735 F.2d at 1138-1139].[5/]

In deploring such haste, petitioners by no means contend that appellate imposition of sanctions should disappear. They are mindful of the number of appeals

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5/ See also, Barnd v. City of Tacoma, 664 F.2d 1339, 1342-1343 (9th Cir. 1982); McConnell v. Critchlow, 661 F.2d 116, 119 (9th Cir. 1981).

Other circuits are conspicuously agreed on the need for this basic protection. See, for example, United States v. Phoenix Petroleum Co., 727 F.2d 1579, 1580 (Em.Ct.App. 1984); Knorr Brake Corp. v. Harbil, Inc., supra, 738 F.2d at 226-228; Matter of Hartford Textile Corp., supra, 613 F.2d at 388.

docketed in the 1980s, of the improvident nature of so many, and of resultant calls to "get tough". While uneasy about the effectiveness of haphazard and unpredictable sanctions (in contrast to such possible alternatives as routine imposition of attorneys' fees on the loser), petitioners certainly recognize the need for Congress and the courts to fashion remonstrative measures.

What they do believe, however, is that economic sanctions and professional obloquy -- whether imposed rarely, frequently or moderately -- still must come only from procedures compatible with fundamental due process. Since the circuit involved has, itself, seemed to agree until recently, its apparent conclusion that procedural fairness has become inimical to sanctions -- i.e., that more sanctions are possible only

if there is less due process -- calls out resoundingly for this Court's attention.

The response should be the one Roadway gave trial courts: Sanctions have a legitimate role in judicial administration, so long as they are not employed in ways that cause sanctions to be at war with due process. What needs clarification is that the two can, and must, coexist equally well at the appellate level.

C. THE ROLE OF THE LEGAL PROFESSION.

The Bar is presently the object of unusual criticism, some of it by members of this Court. Petitioners neither ignore the charges, nor deny there are respects in which many are justified.

Neither do they contend that the legal profession should have protections

denied to others, but they do believe lawyers are entitled to no less due process than people in other occupations (see Gamble v. Pope & Talbot, Inc., 307 F.2d 729, 732-733 (3rd Cir. 1962), cert. den. 371 U.S. 888). It is unlikely this Court would countenance a governmental agency's sudden imposition of sanctions upon, or professional denunciation of, a barber, public accountant, or even a used car dealer by drumhead fiat, without notice or hearing.

Roadway and every court which has been heard on the subject -- explicitly and significantly including the circuit involved here -- extend those same protections to persons who seek their livelihood in the legal profession. Consequently, the only possible rationale of the result below (and of others like it) is that the level a case may have reached

creates a distinction -- between trial counsel and counsel on appeal -- as to whether or not due process is required. Not only is that inherently unattractive but also the realistic differences point toward more care at the appellate level.

Sanctions are usually imposed by trial judges face to face in open-court proceedings where the right to be heard is not merely available, but in the process of being exercised, rather than by ukase issuing out of a closed appellate conference. Moreover, a lawyer punished in a district court has an absolute right to review of that action by appeal, whereas the subject of summary appellate punishment has only the possibility of certiorari from this Court. The empiric differences are manifest.

Petitioners do not shrink from suggesting also that this Court owes some

obligation to those so often identified as its officers. That obligation is not one of privilege or indulgence. Instead, it is comparable to that of a good commander who insures that the troops who carry out his orders are fairly and lawfully treated by intermediate leaders.

D. SPECIAL FACTS DEMONSTRATING NEED.

This is not a "hard case" suggesting enunciation of bad law. It is an extreme case illustrating just how quickly noncompliance with fundamentals can produce evocative and provocative facts.

As the dissent notes [A-23; 735 F.2d at 1139], punishment was visited here on two attorneys, whose roles were very different: Petitioner King tried the case and then turned over briefing and expected argument to petitioner Jampol, an arrangement probably common to most ap-

peals. Yet no distinction is made between them, despite the high probability that factual differences exist which could only be ascertained by listening.

In point of fact, refusal to listen predated the subject of sanctions. In apparent retaliation for petitioner Jampol's asking that argument be postponed so he could comply with another court's order, the Court of Appeals simply forfeited the Malhiots' right to argument on the merits.[6/] The significance of that action -- which is intrinsically disturbing -- lies in the fact that oral argument is the juncture when notice and opportunity are most often afforded, yet the court precluded it.

6/ In doing so, the court below implicitly recognized petitioner King's nonresponsibility; otherwise, it would have denied continuance but permitted him to argue in place of petitioner Jampol.

Finally,[7/] there is the fact that petitioners, realizing that a hearing may sometimes follow a punitive act and still constitute due process (but see Textor v. Board of Regents of N. Ill. Univ., 711 F.2d 1387, 1395-1396 (7th Cir. 1983)), sought a hearing to present the facts after the opinion was filed. That request was also summarily rejected.

CONCLUSION

For these reasons, certiorari should be granted.

Respectfully submitted,

EDWARD L. LASCHER

Attorney for Petitioners

7/ This petition does not address the propriety, vel non, of sanctions here, as distinct from the procedure followed. As indication that petitioners are not pursuing a hollow, useless right, however, it might be considered that the opinion itself misquotes a portion of the allegedly misrepresented statute.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE J. MALHIOT, and MARJORIE M. MALHIOT,	)	
Appellants,	)	CA No. 83-6010
v.	)	DC No. CV 81-4414 CHH
SOUTHERN CALIFORNIA RETAIL CLERKS UNION AND DRUG EMPLOYER PENSION AND TRUST FUND,	)	OPINION
Appellees.	)	

Appeal from the United States District Court for the Central District of California
Hon. Cynthia Holcomb Hall, District Judge, Presiding
Argued and submitted March 8, 1984

Before: SNEED and BOOCHEVER, Circuit Judges, and SOLOMON*, District Judge

SOLOMON, Judge:

Appellant Marjorie Malhiot is a bene-

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* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

ficiary of the Southern California Drug Benefit Fund (Fund), created under a collective bargaining agreement. The Fund (appellee) denied medical benefits to Marjorie and her husband, George Malhiot. The district court affirmed the denial, and the Malhiots appealed. We affirm. We also assess costs and attorney's fees against the Malhiots' attorneys.

Facts

Marjorie Malhiot is employed by Thrifty Corporation. Thrifty employees are beneficiaries of the Fund, which receives employer contributions and provides medical benefits to employees, their spouses, and dependents. The Fund is administered under rules and regulations established by its trustees.

The Fund's eligibility rules provide that a spouse is eligible for benefits

"as of the date of the marriage." The trustees have always defined "spouse" as an individual legally married to a member.

In February, 1981, George Malhiot sought reimbursement from the Fund for medical expenses he incurred in a March, 1980 automobile accident. The Fund's trustees refused to reimburse him for expenses incurred before December, 1980, the date of his marriage to Marjorie. George and Marjorie Malhiot were married in December, 1980, but they contend that they had already been married under California law in 1968.

They assert that they exchanged wedding vows before a minister and witnesses on February 14, 1968, but concede that they had no marriage license and did not receive a marriage certificate.

For several years thereafter, Marjorie listed her last name as Davis (her

previous married name) and her marital status as single on her employment records. She submitted a choice card[1/] to the Fund giving her last name as Davis. In the space on the card labeled "husband and wife," she wrote "none."

Ten years after her alleged 1968 wedding ceremony, Marjorie submitted a choice card to the Fund naming George Malhiot as her spouse. An employee of the Fund requested a marriage certificate which Marjorie did not submit. After a telephone conversation between Marjorie and the Fund employee, the following notation was written on the choice card: "Per phone conversation with member, George is not legal spouse." The employee removed George's name from the card,

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1/ A choice card is filled out by an employee and designates spouse and dependents for benefit purposes.

and Marjorie submitted a new choice card which did not name George.

In March, 1980, George was injured in an automobile accident. On December 26, 1980, Marjorie and George were married. In February, 1981, George submitted his medical bills to the Fund. In March, 1981, Marjorie sent to the Fund a copy of their marriage certificate and a revised choice card naming George as her spouse. In a space labeled "date of marriage," she wrote "12/28/80."

The Fund denied George Malhiot reimbursement for medical expenses incurred before December 28, 1980 on the ground that he was not Marjorie's legal spouse before that date.

The Malhiots filed an action in the California Superior court alleging violations of state insurance laws and the Employees Retirement Income Security Act

of 1974 (ERISA), 29 U.S.C. § 1001 et seq. The Fund removed the action to federal district court. The court granted a stay to permit the Malhiots to administratively appeal the denial to the Fund's Board of Trustees. The Fund's Appeals Committee recommended that the Board of Trustees deny the appeal on the ground that the Malhiots "were not legally married until December 28, 1980 and ... were unmarried at the time of the automobile accident.... [O]nly legal spouses are entitled to coverage." The Board of Trustees denied the Malhiots' appeal.

The district court dismissed the state insurance claims and entered judgment for the Fund on the ERISA claim.

The Malhiots filed a motion for new trial or, in the alternative, a motion to amend the pretrial order. The court denied both motions.

Discussion

I.

The Fund's Declaration of Trust grants the trustees discretion to fashion and apply eligibility requirements. Eligibility decisions by the trustees of an employee benefit plan will not be reversed by the courts unless they are arbitrary, capricious, made in bad faith, not supported by substantial evidence, or erroneous on a question of law. Rehmar v. Smith, 555 F.2d 1362, 1371 (9th Cir. 1976); Music v. Western Conference of Teamsters Pension Trust Fund, 712 F.2d 413, 418 (9th Cir. 1983).

A definition of the word "spouse," which requires a marriage valid under state law, is not arbitrary or capricious. Rehmar, 555 F.2d at 1372.

The district court was required to determine, on the basis of the record

before the trustees, whether the Fund's decision was based on substantial evidence. Hicks v. Pacific Maritime Association, 567 F.2d 355, 358 (9th Cir. 1978). The trustees' decision was based on a letter from the Malhiots' attorney and two of Marjorie's choice cards. The attorney's letter alleged that George and Marjorie Malhiot had lived as husband and wife since 1968 and had exchanged marriage vows that year although "a formal certificate of marriage was never issued." The choice cards included the one with the notation that George's name had been removed after the telephone conversation with Marjorie and the card submitted soon after that conversation that did not name George. This evidence supports the trustees' decision to deny benefits on the ground that the Malhiots were not legally married before December 28, 1980.

Common law marriages are not recognized in California. Menchaca v. Hiatt, 59 Cal.App.3d 117, 130 Cal.Rptr. 607, 613-14 (1976). But the Malhiots argue that under Califoria law, they were legally married in February, 1968 as a result of having lived together and gone through a marriage ceremony. They rely on Section 4213 of the California Civil Code, formerly Civil Code Section 79, which they assert provides that, "Where unmarried persons, not minors, have been living together as man and wife, they may be married by any clergyman, without a license or a health certificate." This quotation is the first sentence of a version of Section 79 that was in effect from 1878 until 1954. The second sentence of the statute, not cited by the Malhiots, is as follows: "A certificate of such marriage must, by the clergyman, be made

and delivered to the parties, and recorded upon the records of the church of which the clergyman is a representative. No other record need be made."

The version of Section 79 that was in effect from 1954 until 1969 provided:

> When ummarried persons, not minors, have been living together as man and wife, they may, without a license, be married by any clergyman. A certificate of such marriage shall, by the clergyman, be made and delivered to the parties, and recorded upon the records of the church of which the clergyman is a representative. No other record need be made.

The present version, now Section 4213, reads:

> When an unmarried man and an unmarried woman, not minors, have been living together as husband and wife they may without a license, be married by any person authorized to solemnize a marriage under Sections 4205, 4205.1, and 4205.5, without the necessity of first obtaining health certificates.
>
> * * *
>
> Upon performance of the ceremony, the person performing the ceremony

> shall give a copy of the confidential marriage certificate to the parties who were married. The person performing the ceremony shall also provide the parties who were married with an application for a certified copy of the confidential marriage certificate which shall be filled out by the parties and sent by the person performing the marriage to the county clerk.
>
> * * *

Every version of the statute since 1878 has required certification by the person performing the ceremony in order for the marriage to be valid. The Malhiots have never produced a marriage certificate from the 1968 ceremony and were therefore not legally married under Section 79. The trustees correctly decided that the Malhiots were not married until December 28, 1980, and the district court properly upheld their decision.

II.

The Malhiots apparently believe that if they can prove that they lived togeth-

er before the 19[illegible] ceremony, they will have proved that they were legally married under Section 79.

The Malhiots stipulated to a pretrial order which stated, "Plaintiffs Marjorie M. and George J. Malhiot have lived together since September 1, 1968." The Malhiots now assert that "1968" was a typographical error that they did not discover until after the trial. They allege that the date in the order should have been September 1, 1967. The Malhiots contend that the district court's refusal to allow amendment of the pretrial order or to grant a new trial was an abuse of discretion.

The Malhiots' argument is without merit. The record discloses no evidence that the number "1968" was an error. The 1968 date conforms to the Malhiots' com-

plaint, to their deposition testimony[2/], and to the letter which they submitted to the Fund.

A pretrial order will be modified only to prevent manifest injustice. Fed. R. Civ. P. 16(e). Even if there had been an error, amendment of the pretrial order would not have changed the evidence that was before the trustees and therefore would not have affected the outcome of the action. The district court's denial of the Malhiots' motion to amend the pretrial order was proper.

The same analysis applies to the dis-

2/ The original and first amended complaints state, "Plaintiffs have lived as husband and wife since 1968; on or about that date plaintiffs exchanged marriage vows and thereafter continuously declared ... that they were and are husband and wife." In their depositions, both Malhiots stated that they met in December, 1967 and began living together "the first week of February, 1968."

trict court's denial of the Malhiots' motion for a new trial. A new trial is warranted only when an error has caused substantial harm to the losing party. Fed. R. Civ. P. 61. No such error existed here.

III.

The Malhiots contend that the Fund's appeal procedure denied them due process because they were not allowed to appear before the trustees in person, put on evidence, or confront witnesses. The Malhiots failed to raise this issue in the pretrial order or at trial. The Fund's appeal process complies with ERISA regulations. 29 C.F.R. 2560.503-1(g).[3/]

3/ The regulations provide:

> Every plan shall establish and maintain a procedure by which a claimant or his duly authorized representative has a reasonable opportunity to appeal a denied

[continued on next page]

An issue not listed in the pretrial order or raised later at trial will not be entertained on appeal. United States v. Joyce, 511 F.2d 1127, 1130 n.1 (9th Cir. 1975); Westinghouse Electric Corporation v. Weigel, 426 F.2d 1356, 1357 (9th Cir. 1970).

IV.

The Fund seeks an award of attorney fees from appellants' attorneys on the ground that the appeal is frivolous. Rule 38 of the Federal Rules of Appellate Procedure grants this court discretion

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Footnote 3, continued:

claim to an appropriate named fiduciary or to a person designated by such fiduciary, and under which a full and fair review of the claim and its denial may be obtained. Every such procedure shall include but not be limited to provisions that a claimant or his duly authorized representative may: (i) request a review upon written application to the plan; (ii) review pertinent documents; and (iii) submit issues and comments in writing.

to award damages, attorney's fees, and single or double costs as a sanction for bringing a frivolous appeal. Wood v. Santa Barbara Chamber of Commerce, Inc., 699 F.2d 484, 485 (9th Cir. 1983). An appeal is frivolous if the result is obvious or if the claims of error are wholly without merit. DeWitt v. Western Pacific Railroad Co., 719 F.2d 1448, 1451 (9th Cir. 1983).

The Malhiots' argument that they were legally married under former Civil Code Section 79 is contradicted by the language of the statute and is wholly without merit. Even the pre-1954 statute quoted by counsel contained a sentence -- omitted from counsel's quotation -- requiring a marriage certificate. Every version of the statute after 1954 also required a marriage certificate. If the statute had been quoted in full, it would

would have been obvious that the Malhiots did not meet the requirements for a legal marriage under Section 79.

The Malhiots' contention that the trial court abused its discretion is also wholly without merit. Neither an amended pretrial order nor a new trial would have had the slighted effect on the outcome of this action. In addition, the Malhiots' due process argument was not raised before the trustees or the district court and cannot be raised here.

We conclude that this appeal is frivolous and that sanctions under Rule 38, Federal Rules of Appellate Procedure are appropriate. This court is further authorized by 28 U.S.C. § 1927 to award fees and excess costs against counsel who multiply the proceedings in any case unreasonably and vexatiously. In this court, application of Section 1927 re-

quires bad faith or intentional misconduct by counsel. Barnd v. City of Tacoma, 664 F.2d 1339, 1343 (9th Cir. 1982).

Counsel's briefs to this court contain many misrepresentations of the record record and an intentional misstatement of California law. In addition to quoting a statute that was superseded in 1954, counsel omitted from the quotation the sentence requiring a marriage certicate. Attorneys appearing before this court are held to the standards imposed by the American Bar Association's Code of Professional Responsibility. MacDonald v. Musick, 425 F.2d 373, 376 (9th Cir. 1970); Southern Pacific Transp. v. Public Utilities Comm'n, 716 F.2d 1285, 1291 (9th Cir. 1983), petition for cert. filed, 52 U.S.L.W. 3535 (U.S. Dec. 23, 1983). The Code's disciplinary rules require that attorneys not engage in con-

duct that involves misrepresentation or that is prejudicial to the administration of justice; that they not present claims unwarranted by existing law; and they [sic] they not knowingly make a false statement of fact or or law.[4/] Counsel has violated these rules. This conduct constitutes the requisite bad faith and intentional mismisconduct for which sanctions under Section 1927 are appropriate.

Pursuant to this authoriity, we award damages of $1,500, which includes costs and attorney's fees, to the Fund. We make this award jointly and severally against appellants' counsel, Alan R. Jampol and Nolan F. King.

4/ Code of Professional Responsibility DR 1-102(A)(4) and (5), 2-109(A)(2) and 7-102(A)(5) (1979).

BOOCHEVER, Circuit Judge, concurring and dissenting, in part:

I agree with Judge Solomon's opinion with one exception. I think that we should issue an order to show cause to the attorneys before imposing the sanction of an award of costs and attorney's fees.

My conclusion is that counsel is entitled to some sort of notice and hearing before this court holds them liable for costs and attorney's fees under 28 U.S.C. § 1927. The lead case supporting such a requirement is Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980). There, in discussing the "inherent" power of a federal court to assess fees against counsel for bad faith conduct, the Court stated that "[l]ike other sanctions, attorneys' fees certainly should not be

assessed lightly or without fair notice and an opportunity for a hearing on the record." Id. at 767 (footnote omitted). Several Ninth Circuit cases also support the need for a hearing.

In Barnd v. City of Tacoma, 664 F.2d 1339 (9th Cir. 1982), the district court ordered defense counsel to pay costs and fees as a sanction. On appeal, in analyzing the court's power to assess such fees, we noted the Roadway Express qualification regarding necessity of notice and hearing. Id. at 1342-43.

In United States v. Blodgett, 709 F.2d 608 (9th Cir. 1983), the district court sanctioned counsel under 28 U.S.C. § 1927 for filing an interlocutory appeal the court found frivolous. This court remanded, holding that, because the conduct giving rise to imposition of sanctions occurred outside the presence of

the district court, counsel was entitled to an opportunity to explain his conduct. Id. at 610.

In Miranda v. Southern Pacific Transportation Co., 710 F.2d 516 (9th Cir. 1983), the district court summarily imposed a monetary sanction on counsel under the auspices of a local rule. This This court held that counsel was entitled to notice, an opportunity to prepare a defense and a hearing before imposition of monetary sanctions. We stated:

> This court, in an analogous circumstance, will not impose monetary penalties or take other disciplinary actions for an attorney's failure to comply with its orders until "after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested . . . ." Fed. R. App. P. 46(c); see United States v. Birtle, 521 F.2d 134 (9th Cir. 1975), cert. denied, 426 U.S. 947, 96 S.Ct. 3165, 49 L.Ed.2d 1183 (1976).

Id. at 522.

Since section 1927 requires bad faith

or intentional misconduct by counsel, I think that counsel should be entitled to present any arguments that they may have as to why the sanction should not be imposed. This is particularly true in this case since two attorneys signed the brief and there was no oral argument. It may well be that at least one of the attorneys may be able to convince us that he had no part in the misleading arguments which are really the basis for imposing the sanction, and that he did not consciously adopt those arguments.

It seems to me that our case is controlled by United States v. Blodgett, 709 F.2d 608. In that case the district court imposed sanctions on counsel for filing a frivolous appeal. We held:

> While on the facts we cannot conclude that the district court erred in finding that the appeal was frivolous, the mere fact that an appeal is frivolous does not of itself establish bad

> faith. To establish bad faith on this record, a hearing was required to detemine if the appeal was taken solely for purposes of delay.

Id. at 610.

Similarly here, in order for us to determine that one or both of the attorneys acted in bad faith it is necessary to afford them a hearing.

I have not found a case addressing the issue of what specific procedure this court generally follows when it imposes a sanction under 28 U.S.C. § 1927. In McConnell v. Critchlow, 661 F.2d 116, 119 (9th Cir. 1981), however, we did impose a sanction under the statute. The opinion notes that counsel at oral argument was given an opportunity to state any reason why sanctions should not be imposed. Because no oral argument was held on the merits of the case at bar, I believe that the proper procedure at this time is to

is to issue an order to counsel to show cause why a penalty should not be imposed. See United States v. Birtle, 521 F.2d 134 (9th Cir. 1975), cert. denied, 426 U.S. 947 (1976) (following this procedure before sanctioning counsel under Fed. R. App. P. 46(c) for failure to prosecute an appeal with due diligence).

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE J. MALHIOT, et al.,	)	
	)	No. 83-6010
Plaintiffs-Appellants,	)	
	)	
v.	)	ORDER
	)	
SOUTHERN CALIFORNIA RETAIL CLERKS UNION, et al.,	)	
	)	
Defendants-Appellees.	)	

Appellants' February 28, 1984 Application for Continuance of Hearing is denied.

This case shall stand submitted on the brief.

APPENDIX B

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE J. MALHIOT, and MARJORIE M. MALHIOT,	)	CA No. 83-6010
Appellants,	)	DC No. CV 81-4414 CHH
v.	)	
SOUTHERN CALIFORNIA RETAIL CLERKS UNION AND DRUG EMPLOYER PENSION AND TRUST FUND,	)	ORDER
Appellees.	)	

Before: SNEED and BOOCHEVER, Circuit Judges, and SOLOMON,* District Judge

Appellants' petition for rehearing and request for a hearing on sanctions is denied.

*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.